

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 18**

H&S ENTERPRISES, INC.

Employer

and

TEAMSTERS, LOCAL 120

Petitioner

Case 18-RC-266678

DECISION AND DIRECTION OF ELECTION

This case is before me pursuant to a stipulated record entered between the parties on October 15, 2020.¹ The parties waived their right to a pre-election hearing and stipulated that the sole issue is whether the election should be conducted in person or by mail ballot, which is a non-litigable matter.² The National Labor Relations Board has delegated its discretion in determining such arrangements to Regional Directors. *San Diego Gas & Electric*, 325 NLRB 1143, 1144 (1998). The Employer argues for a manual election. The Petitioner argues for a mail ballot election. In carefully considering the arguments made by the Employer and Petitioner on this issue, I find that a mail ballot election is appropriate under the extraordinary circumstances presented by the current state of the COVID-19 pandemic.

CONCLUSIONS

Based upon the entire record in this matter, I conclude as follows:

1. The Employer is an employer engaged in commerce within the meaning of Sections 2(2), (6), and (7) of the Act.³
2. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act and claims to represent certain employees of the Employer.
3. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

¹ All dates are in 2020, unless otherwise noted.

² Sec. 102.66(g)(1) of the Board's Rules and Regulations. See also, *Representation-Case Procedures*, 84 Fed. Reg. 69524, 69544 fn. 82 (Dec. 18, 2019) (citing *Manchester Knitted Fashions, Inc.*, 108 NLRB 1366, 1367 (1954)).

³ The Employer is engaged in the business of providing common/contract carrier services with a principle place of business located in Kearney, Nebraska, and a distribution facility located in Aberdeen, South Dakota. During the past year, a representative period, in the course and conduct of its above-described business, the Employer purchased and received materials or services in excess of \$50,000 directly from points located outside the State of Nebraska.

4. There are no contract bars or any further bars in existence that would preclude the Region from processing the petition.

5. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All regular full-time and regular part-time drivers employed by the employer and reporting into at the Aberdeen facility, 810 3rd Avenue S.E., Aberdeen, South Dakota; but excluding all clerical employees, warehouse workers, professional employees, managers, supervisors and guards as defined by the Act, and all other employees.

DIRECTION OF ELECTION

The Board will conduct a secret ballot election among the employees in the unit above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by the Teamsters, Local 120. For the reasons described below, I have determined that a mail ballot election will be conducted in this matter.

I. The Employer's Operations

The Employer is a licensed-and-bonded freight shipping and trucking company with a distribution warehouse located in Aberdeen, South Dakota. The stipulated bargaining unit contains approximately 17 employees, who have worked throughout the COVID-19 pandemic as essential workers.

II. The Positions of the Parties

The Employer argues for a manual election, pointing out manual elections are normally favored by the Board. In support of its contention extraordinary circumstances warranting a mail ballot election are not present in this case, it notes that South Dakota has never issued any stay-at-home or "closure" orders and that its operations have continued uninterrupted during the COVID-19 pandemic. The Employer highlights safety protocols it has implemented to help mitigate risk, specifically:

- Sending home any employee that exhibits symptoms of COVID-19;
- Advising any employee who has a temperature or is displaying symptoms to immediately contact their supervisor;
- Restricting visitor access to the warehouse and requiring that visitors or contractors wear masks;
- Limiting in-person meetings and following social distancing protocols in common areas;
- Sanitizing the entire facility, including work surfaces, door handles, break rooms, common areas, and restrooms with hospital-grade sanitation products daily;
- Sanitizing tractors daily;
- Requiring hand washing at task completion;
- Placing hand sanitizing stations throughout the facility;

- Requiring employees to wear masks any time they are not able to maintain physical distancing while in their work area and when they are on their way to and from their work area;
- Providing personal protective equipment (PPE) to employees;
- Providing safety training to employees regarding social distancing, personal hygiene,
- PPE, and sanitation of individual work areas;
- Confirming compliance with PPE requirements for numerous H&S customers;
- Posting health and safety signage in common areas.

In addition, for a manual election, the Employer offers to provide PPE, such as face shields, face masks, and gloves to employees, observers, and the Board agent conducting the election, as well as hand sanitizer at the entrance to its facility and for use immediately before and after handling a manual ballot. It also agrees to limit each party to only one observer and one representative during the election, preelection conference, and ballot count.

The Employer also states that it will follow the guidance included in General Counsel Memorandum 20-10 entitled “Suggested Manual Election Protocols” (GC 20-10) and notes its proposed onsite voting area is spacious enough to accommodate social distancing between the election participants,⁴ and it will install plexiglass barriers to separate observers, voters, and the Board agent during the election and participants during the preelection conference and ballot count. In its initial statement of position,⁵ the Employer proposed a single 10-hour polling period, from 7:00 a.m. to 5:00 p.m. Finally, the Employer asserts mail balloting during the COVID-19 pandemic will likely have an adverse impact on voter turnout and the reliability of the election results.

The Petitioner argues for a mail ballot election. It notes the surge in COVID-19 cases in South Dakota that has become particularly acute in the last month, including in Brown County, where a manual election would be held. The Petitioner cites to CDC guidance advising people to “limit in-person contact as much as possible,” and argues prolonged exposure in an enclosed space, which would occur in a manual election, represents a danger to the health and safety of the election participants. It also notes the Employer’s COVID-19 policy does not permit any employee who is sick or displays a fever or other symptoms to enter the Employer’s facility, which could deprive eligible employees of their right to vote. Additionally, it points out employees required to quarantine due to having, or being exposed to, COVID-19 would likewise not be able to vote during a manual election. The Petitioner argues that both of these scenarios are avoided with a mail ballot, which ensures all employees have ample opportunity to vote.

⁴ The Employer first proposed a training room measuring approximately 25 foot by 42 foot that is “well ventilated” but did not describe the air circulation or provide the height of the room. In response to the Union’s position in favor of a mail ballot election, the Employer proposed a rotunda “at the upper level of the Aberdeen offices;” however, it did not provide the measurements of the rotunda or its ventilation.

⁵ I take administrative notice of the Employer’s statement of position (Form NLRB-505) and the Union’s responsive statement of position, which were submitted to the Region and served on all parties but are not part of the stipulated record. Sec. 102.63(b) of the Board’s Rules and Regulations.

III. Board Law and Agency Directives

Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to ensure the fair and free choice of bargaining representatives, and the Board, in turn, has delegated the discretion to determine the arrangements for an election to Regional Directors, including the ability to direct a mail ballot election where appropriate. *Ceva Logistics US*, 367 NLRB 628, 628 (2011) (cases cited therein); *San Diego Gas & Electric*, 325 NLRB 1143, 1144 (citing *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330 (1946); *Halliburton Services*, 265 NLRB 1154, 1154; *National Van Lines*, 120 NLRB 1343, 1346 (1958)). “It is well established that a Regional Director has broad discretion in determining the method by which an election is held, and whatever determination a Regional Director makes should not be overturned unless a clear abuse of discretion is shown.” *Nouveau Elevator Industries, Inc.*, 326 NLRB 470, 471 (1998) (citing *San Diego Gas*, above at 1144 fn. 1; *National Van Lines*, above at 1346).

The Board’s longstanding policy is that elections should, as a general rule, be conducted manually; however, a Regional Director may reasonably conclude, based on circumstances tending to make voting in a manual election difficult, to conduct an election by mail ballot. NLRB Casehandling Manual (Part Two) Representation Proceedings, Sec. 11301.2.⁶ This includes a few specific situations addressed by the Board, including where voters are “scattered” over a wide geographic area, “scattered” in time due to employee schedules, in strike situations, or other “extraordinary circumstances.” In exercising discretion in such situations, a Regional Director should also consider the desires of all the parties, the likely ability of voters to read and understand mail ballots, the availability of addresses for employees, and what constitutes the efficient use of Board resources. *San Diego Gas*, above at 1145. Thus, while there is a clear preference for conducting manual elections in ordinary circumstances, Board law indicates Regional Directors may use discretion to order a mail ballot election under the guidelines in *San Diego Gas*, including extraordinary circumstances, and Regional Directors should tailor the method of conducting an election to “enhance the opportunities of all to vote.” *Ibid.*

The Board recognized the ongoing COVID-19 pandemic to constitute “extraordinary circumstances” and reaffirmed Regional Directors’ discretion regarding election mechanics in its April 17 “COVID-19 Operational Status Update.”⁷ In pertinent part:

Representation petitions and elections are being processed and conducted by the regional offices. Consistent with their traditional authority, Regional Directors have discretion as to when, where, and if an election can be conducted, in accordance with existing NLRB

⁶ I note the provisions of the Casehandling Manual are not Board directives or procedural rules. The Casehandling Manual is issued by the General Counsel, who does not have authority over matters of representation, and is only intended to provide nonbinding guidance to regional personnel in the handling of representation cases. See Representation-Case Procedures, 84 Fed. Reg. 39930, 39937 fn. 43 (2019) (“the General Counsel’s nonbinding Casehandling Manual”); *Patient Care*, 360 NLRB 637, 638 (2014) (citing *Solvent Services*, 313 NLRB 645, 646 (1994); *Superior Industries*, 289 NLRB 834, 837 fn. 13 (1988)); *San Diego Gas*, 325 NLRB at 1145 fn. 5 (and cases cited therein). See also *Sunnyvale Medical Clinic*, 241 NLRB 1156, 1157 fn. 5 (1979).

⁷ <https://www.nlr.gov/news-outreach/news-story/covid-19-operational-status-update>.

precedent. In doing so, Regional Directors will consider the extraordinary circumstances of the current pandemic, to include safety, staffing, and federal, state and local laws and guidance.

The Board has continued to affirm the ongoing COVID-19 pandemic to be extraordinary circumstances as contemplated by *San Diego Gas*, above, and its recent Orders⁸ explain:

The Board will continue considering whether manual elections should be directed based on the circumstances then prevailing in the Region charged with conducting the election, including the applicability to such a determination of the suggested protocols set forth in GC Memorandum 20-10.⁹

As the Board's Orders instruct, I analyze the instant petition using the prevailing circumstances in the Region.¹⁰

A. Prevailing COVID-19 Circumstances

COVID-19 has created a public health crisis, responsible for upwards of 226,000 deaths in this country, and has infected more than 8.75 million U.S. residents.¹¹ Much remains unknown about this deadly and debilitating virus, as the U.S. Centers for Disease Control and Prevention (CDC) continues to recognize: "We are still learning about how the virus spreads and the severity of illness it causes."¹² This can be seen in the CDC's acknowledgement earlier this

⁸ See *Savage Services Corp.*, 21-RD-264617 (unpublished October 1, 2020) (denying review of Regional Director's decision to order a mail ballot election); *Jersey Shore University Medical Center*, 22-RC-263932 (unpublished October 1, 2020) (same); *Sea World of Florida, LLC*, 12-RC-257917 (unpublished September 22, 2020) (same); *Rising Ground*, 02-RC-264192 (unpublished September 8, 2020) (same); *TredRoc Tire Services*, 13-RC-263043 (unpublished August 19, 2020) (same); *Daylight Transport, LLC*, 31-RC-262633 (unpublished August 19, 2020) (same); *PACE Southeast Michigan*, 07-RC-257047 and 07-RC-257046 (unpublished August 7, 2020) (same); *Sunsteel, LLC*, 19-RC-261739 (unpublished August 4, 2020) (same); *Brink's Global Services USA, Inc.*, 29-RC-260969 (unpublished July 14, 2020) (same).

⁹ On July 6, General Counsel Peter Robb issued GC 20-10 setting forth suggested election protocols while specifically noting that it is not binding on Regional Directors because the Board not the General Counsel has authority over matters of representation. Among other things, the General Counsel proposes self-certification that individuals in proximity to the polling place, including observers and party representatives, have not tested positive for COVID-19, or come into contact with someone who tested positive within the preceding 14 days, and are not awaiting test results, along with identifying the number of individuals exhibiting COVID-19 symptoms.

¹⁰ While the Board has stayed several directed mail ballot elections since late August, including one case in this Region, stating the requests for review "raised substantial issues warranting review," it has not specified the issues that caused it to grant review, delineated factors outside of *San Diego Gas* to be considered during the COVID-19 pandemic, established a different standard for determining the method of election, or issued any other ruling that impacts my conclusions and findings herein.

¹¹ "CDC COVID Data Tracker." CDC. <https://www.cdc.gov/covid-data-tracker/#cases> (accessed October 29).

¹² "How COVID-19 Spreads" (updated October 28). CDC. <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html> (accessed October 29).

month that COVID-19 spreads not just through respiratory droplets and “close contact”¹³ but also via smaller airborne “particles that can remain suspended in the air over long distances (usually greater than 6 feet) and time (typically hours).”¹⁴ Some studies place transmission distances over 25 feet.¹⁵ Around the same time, the CDC also expanded the underlying medical conditions that place people at a higher risk of severe illness from COVID-19 to include adults with obesity, or who are overweight, or who smoke or have a history of smoking.¹⁶ On October 28, the CDC further reported the existence of COVID-19 reinfections.¹⁷

In assessing the local conditions, I must consider the state of the pandemic in South Dakota, particularly Brown County, where the petitioned-for employees are located and where a manual election would be held, along with the Minneapolis–Saint Paul metropolitan area, where Region 18’s Board agents are located and would be required to travel to conduct the election.

Currently, the number of new COVID-19 cases continues to climb. Unfortunately, South Dakota is at the forefront of the third COVID-19 surge. With an average of 101.6 new cases per 100,000 residents over the past seven days, *nearly five times* the national average of 21.8, South Dakota ranks second out of the 50 states behind only neighboring North Dakota.¹⁸ Brown County, where a manual election would be held, shares a border with North Dakota. South Dakota reached a record number of active cases¹⁹ and hospitalizations²⁰ in the past week, and its COVID-19 numbers continue to trend upwards with the *Argus Leader* (South Dakota’s largest

¹³ On October 21, the CDC expanded its definition of “close contact” from being within 6 feet of an infected person for at least 15 minutes to being within 6 feet of an infected person for at least 15 minutes over a 24-hour period, clarifying that multiple separate encounters that total more than 15 minutes carries a higher risk of transmission. “Appendices” (updated October 21, 2020). CDC. <https://www.cdc.gov/coronavirus/2019-ncov/php/contact-tracing/contact-tracing-plan/appendix.html> (accessed October 29).

¹⁴ “Scientific Brief: SARS-CoV-2 and Potential Airborne Transmission” (updated October 5). CDC. <https://www.cdc.gov/coronavirus/2019-ncov/more/scientific-brief-sars-cov-2.html> (accessed October 29). See also “How COVID-19 Spreads,” above.

¹⁵ “What is the evidence to support the 2-metre social distancing rule to reduce COVID-19 transmission?” (June 22). Centre for Evidence-Based Medicine, University of Oxford. <https://www.cebm.net/covid-19/what-is-the-evidence-to-support-the-2-metre-social-distancing-rule-to-reduce-covid-19-transmission/> (“Smaller airborne droplets laden with SARS-CoV-2 may spread up to 8 metres [26 feet] concentrated in exhaled air from infected individuals Whilst there is limited direct evidence that live SARS-CoV-2 is significantly spread via this route, there is no direct evidence that it is *not* spread this way”) (emphasis in original) (accessed October 29).

¹⁶ “People with Certain Medical Conditions” (October 16, 2020). CDC. <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html> (accessed October 22, 2020).

¹⁷ “How COVID-19 Spreads,” above.

¹⁸ “CDC COVID Data Tracker,” above. The states with highest new case rates per 100,000 residents are North Dakota (107.9), South Dakota (101.6), Wisconsin (72.7), Montana (70.6), and Wyoming (56.4).

¹⁹ “COVID-19 in South Dakota: 1,000 new total cases; Death toll rises to 403; Active cases at 12,462” (October 29). KELOLAND Media Group. <https://www.keloland.com/news/local-news/covid-19-in-south-dakota-1000-new-total-cases-death-toll-rises-to-403-active-cases-at-12462/> (accessed October 29).

²⁰ “South Dakota reports record COVID-19 hospitalizations” (October 26). *Argus Leader*. <https://www.argusleader.com/story/news/2020/10/26/south-dakota-coronavirus-covid-19-daily-cases/6040420002/> (accessed October 29).

circulating newspaper) reporting that it leads the nation in cases, hospitalizations, and positive tests per 100,000, according to data compiled by *The New York Times* as of October 29.²¹ Undoubtedly, the COVID-19 pandemic has significantly worsened in South Dakota.

Brown County in South Dakota, where the election is to take place, has not been spared and ranks fourth out of South Dakota's 66 counties in total number of COVID-19 cases.²² Hennepin and Ramsey Counties in Minnesota, which encompass the twin cities of Minneapolis and Saint Paul where Board agents would have to travel from, have the highest and second highest totals, respectively, accounting for over 35% of that state's total cases and over 56% of its COVID-19 related deaths.²³ It is not possible for me to know if these numbers represent an increase in the number of infections, a reflection of more widespread testing or better reporting. However, it is sufficient to establish that there is no seen improvement in COVID-19 conditions and that there continues to be spread of COVID-19, factors which lead me to conclude there is too much risk to holding a manual election at this time or in the near future.

It is not known when or how many, if any, confirmed, probable, or suspected cases of COVID-19 have occurred among the petitioned-for employees, other employees or visitors at the Employer's Aberdeen facility, or if any employees have quarantined or isolated due to exhibiting symptoms of COVID-19 or contact with someone who had COVID-19 or exhibited its symptoms.

B. Current Federal, State, and Local Directives

The United States and South Dakota both remain in declared states of emergency due to COVID-19.²⁴

The CDC explains that "COVID-19 is thought to spread mainly through close contact from person to person, including between people who are physically near each other (within about 6 feet). People who are infected but do not show symptoms can also spread the virus to

²¹ "South Dakota leads nation in cases, hospitalizations and positive tests per 100,000 people" (October 29). *Argus Leader*. <https://www.argusleader.com/story/news/crime/2020/10/29/south-dakota-leads-nation-covid-19-cases-hospitalizations/6069523002/> (accessed October 29).

²² "COVID-19 in South Dakota." South Dakota Department of Health (SD-DOH). <https://doh.sd.gov/news/Coronavirus.aspx> (accessed October 29). The counties with the highest case totals are Minnehaha (11,281), Pennington (4,381), Lincoln (2,759), Brown (2,014), and Codington (1,479).

²³ "Situation Update for COVID-19, Residence" (updated October 29). Minnesota Department of Health. <https://www.health.state.mn.us/diseases/coronavirus/situation.html> (Hennepin County has 35,484 cases and 995 deaths and Ramsey County has 14,726 cases and 372 deaths while the State of Minnesota has a total of 142,311 cases and 2,419 deaths) (accessed October 29).

²⁴ "Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak" (March 13). The White House. <https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/> (accessed October 29); "Executive Order 2020-30" (July 7). South Dakota Secretary of State. <https://sdsos.gov/general-information/executive-actions/executive-orders/search/Default.aspx> (accessed October 29).

others.”²⁵ The CDC and South Dakota Department of Health (SD-DOH) highlight: **“The best way to prevent illness is to avoid being exposed to this virus”** (emphasis in originals).²⁶ “It spreads through respiratory **droplets or small particles, such as those in aerosols, produced when an infected person coughs, sneezes, sings, talks, or breathes**” (emphasis in original).²⁷ The CDC also warns: **“It is important to realize that you can be infected and spread the virus but feel totally well and have no symptoms”** (emphasis in original).²⁸

The CDC’s recommendations for dealing with this public health threat include, among others, the avoidance of large gatherings, the use of facial coverings, good personal hygiene, and social distancing of at least six feet. Guidance issued by the CDC recommends limiting in-person visits to stores as well as in-person contact for deliveries, whenever possible, and notes contracting COVID-19 through the mail is an “unlikely possibility.” In order to further mitigate the minimal risk associated with domestic mail, the CDC simply advises: “After collecting mail from a post office or home mailbox, wash your hands with soap and water for at least 20 seconds or use a hand sanitizer with at least 60% alcohol.”²⁹

Updated guidance from the CDC continues to highlight: “Travel increases your chance of getting and spreading COVID-19. **Staying home is the best way to protect yourself and others from COVID-19**” (emphasis in original).³⁰ Minnesota, from where Board agents conducting the election must travel, cites to this updated CDC guidance.³¹

C. Election Guidance

While the CDC has not specifically addressed Board elections; it has issued recommendations based on the following guiding principles:

The more an individual interacts with others, and the longer that interaction, the higher the risk of COVID-19 spread. Elections with only in-person voting on a single day are

²⁵ “How COVID-19 Spreads, above. The South Dakota Department of Health (SD-DOH) also recognizes these COVID-19 facts. See “Precautions to Avoid Illness.” SD-DOH. <https://doh.sd.gov/news/Coronavirus.aspx#Avoid> (accessed October 29).

²⁶ “How to Protect Yourself & Others” (updated October 28). CDC. <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html> (accessed October 29); “Precautions to Avoid Illness.” SD-DOH, above.

²⁷ “Frequently Asked Questions, Spread” (updated October 21). CDC. <https://www.cdc.gov/coronavirus/2019-ncov/faq.html#Spread> (accessed October 29).

²⁸ “Overview of Testing for SARS-CoV-2 (COVID-19)” (updated October 21). CDC. <https://www.cdc.gov/coronavirus/2019-ncov/hcp/testing-overview.html> (accessed October 29).

²⁹ “Running Essential Errands” (updated September 11). CDC <https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/essential-goods-services.html> (accessed October 29).

³⁰ “Travel during the COVID-19 Pandemic” (updated October 21). CDC. <https://www.cdc.gov/coronavirus/2019-ncov/travelers/travel-in-the-us.html> (accessed October 29).

³¹ “Travel Resources / COVID-19 Updates and Information.” State of Minnesota. <https://mn.gov/covid19/for-minnesotans/get-help/travel.jsp> (accessed October 29).

higher risk for COVID-19 spread because there will be larger crowds and longer wait times.

Specifically, the CDC instructs officials to “[c]onsider offering alternatives to in-person voting if allowed” and recommends voters “[c]onsider voting alternatives available in your jurisdiction that minimize contact. Voting alternatives that limit the number of people you come in contact with or the amount of time you are in contact with others can help reduce the spread of COVID-19” (emphasis in original).³² In line with the CDC’s principles, on April 17, due to COVID-19, South Dakota Secretary of State Steve Barnett mailed absentee ballot applications to every resident registered to vote. Secretary Barnett credited the mailings with increased voter turnout and expressed confidence in the United States Postal Service to handle the mail-in ballots.³³

On July 6, General Counsel Peter Robb issued GC 20-10, a memorandum setting forth suggested manual election protocols. While specifically noting that it is not binding on Regional Directors because the Board, not the General Counsel, has authority over matters of representation, it provides, in relevant part:

They [Regional Directors] have made, and will continue to make, these decisions on a case-by-case basis, considering numerous variables, including, but not limited to, the safety of Board agents and participants when conducting the election, the size of the proposed bargaining unit, the location of the election, the staff required to operate the election, and the status of pandemic outbreak in the election locally.

In other words, GC 20-10 offers advice on how to conduct a manual election when and if a Regional Director determines a manual election is appropriate. It is not a checklist whereby a manual election is mandated if the protocols are met.

The suggested protocols include: polling times sufficient to accommodate social distancing without unnecessarily elongating exposure among Board agents and observers; the employer’s certification in writing that the polling area is consistently cleaned in conformity with CDC standards; a spacious polling area, sufficient to accommodate six-foot distancing; separate entrances and exits for voters; separate tables spaced six feet apart; sufficient disposable pencils without erasers for each voter to mark their ballot; glue sticks or tape to seal challenge ballot envelopes; plexiglass barriers of sufficient size to protect the observers and Board agents; and provision of masks, hand sanitizers, gloves, and disinfecting wipes.

The General Counsel’s suggestions also include the Employer’s self-certification 24 to 48 hours before a manual election for how many individuals have been present in the facility within the preceding 14 days who have tested positive for COVID-19; who have been directed

³² “Considerations for Election Polling Locations and Voters.” U.S. Centers for Disease Control and Prevention. <https://www.cdc.gov/coronavirus/2019-ncov/community/election-polling-locations.html> (accessed October 29).

³³ “S.D. election officials say vote-by-mail and voting at polls will be safe, fair and accurate” (September 10). *Argus Leader*. <https://www.argusleader.com/story/news/2020/09/10/s-d-election-officials-say-vote-mail-and-voting-polls-safe-fair-and-accurate/3461929001/> (accessed October 29).

by a medical professional to proceed as if they have tested positive for COVID-19; who are awaiting results of a COVID-19 test; who are exhibiting symptoms of COVID-19; or who have had direct contact with anyone in the previous 14 days who has tested positive for COVID-19. The certifications in GC 20-10 state “symptoms of COVID-19, including a fever of 100.4°F or higher, cough, or shortness of breath.” However, the CDC’s “Symptoms of Coronavirus” and South Dakota’s “Symptoms and Potential Exposure” include additional symptoms:³⁴

- Fever or chills
- Cough
- Shortness of breath or difficulty breathing
- Fatigue
- Muscle or body aches
- Headache
- New loss of taste or smell
- Sore throat
- Congestion or runny nose
- Nausea or vomiting
- Diarrhea

The CDC also notes that the list does not include all possible symptoms while the Employer’s policies recognize these are the “common symptoms.”

IV. Analysis

To support its contention that the ongoing COVID-19 pandemic, which is currently surging in South Dakota, does not present extraordinary circumstances, the Employer cites to the Board’s first Order denying review of a directed mail ballot during this pandemic. *Atlas Pacific Engineering Co.*, 27-RC-258742 (unpublished May 8, 2020). In that Order, the Board relied on “the extraordinary federal, state, and local government directives that have limited nonessential travel, required the closure of nonessential businesses, and resulted in a determination that the regional office charged with conducting this election should remain on mandatory telework.” The Employer notes that Region 18 is not under mandatory telework and South Dakota is not limiting travel or under any closure orders. However, as noted above, the Board revised this standard, removing any reference to nonessential businesses or telework, and, in every Order following *Atlas*, stated that it will consider conducting manual elections based on the circumstances then prevailing in the Region charged with conducting the election, including the applicability to such a determination of the suggested protocols set forth in GC 20-10. Thus, the lack of mandatory telework and orders limiting nonessential travel and requiring the closure of nonessential businesses does not negate the extraordinary circumstances of COVID-19 in a particular area or necessitate a manual election.

To support its argument that mail balloting is likely to have an adverse effect on voter participation and the reliability of the election results, the Employer cites to *Security ‘76/Division of International Total Services*, 272 NLRB 201 (1984) and *Thompson Roofing, Inc.*, 291 NLRB 743 fn. 1 (1988). The Employer misconstrues both decisions. It selectively quotes the Board’s footnote in *Thompson Roofing* (“mail ballot elections are more vulnerable to the destruction of

³⁴ “Symptoms of Coronavirus.” CDC. <https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html> (accessed October 29); “COVID-19 Frequently Asked Questions.” SD-DOH. https://doh.sd.gov/documents/COVID19/covid_faqs_Web.pdf (accessed October 29).

laboratory conditions than are manual ballots because of the absence of direct Board supervision over the employees' voting"), but the Board did not mention potential mail ballot vulnerabilities in order to diminish the effectiveness of mail voting methods. Instead, it took the opportunity to defend mail ballot elections and the procedures put in place to ensure the integrity of such elections. In its full context, the footnote is addressing a ballot that was voided because the voter's name was printed and not signed and reads:

[W]e further note that *the Board has adopted specific procedures for mail ballot elections to preserve the integrity of the election process*. These procedures, including the pertinent instructions here that voters sign and not print their names on the ballot envelope, are necessary because mail ballot elections are more vulnerable to the destruction of laboratory conditions than are manual elections because of the absence of direct Board supervision over the employees' voting. [Emphasis added.]

Ibid. In *Security '76*, the Board invalidated the results of a second election, finding the Postal Service's return of seven mail ballots (23% of eligible voters) as undeliverable to be "tantamount to a failure to provide notice of the election and an opportunity to vote;" however, it specifically noted "additional steps should have been taken to increase the likelihood that eligible voters would at least receive their ballots." Any Board-conducted mail ballot election, held at any time under any circumstances, includes and ensures procedures by which an employee who has not received a ballot in a timely manner may receive a duplicate. In the instant case, neither party contends that the addresses of the eligible employees are not known or up to date, that the petitioned-for employees would be unable to understand the mail-balloting procedure, or that there are any impediments to voter participation by mail ballot. There is no indication that the Postal Service in South Dakota or Minnesota is unable to deliver mail and, as noted above, Secretary Barnett expressed confidence in the Postal Service's ability to effectively handle mail balloting in South Dakota.

The Employer also argues mail balloting could increase employees' risk of contracting COVID-19 because the virus can survive up to 24 hours on cardboard; however, this directly contradicts the CDC's explicit guidance that "it is unlikely to be spread from domestic or international mail, products or packaging"³⁵ and the prophylactic measure to "wash your hands with soap and water for at least 20 seconds or use a hand sanitizer with at least 60% alcohol" after collecting mail.³⁶ Additionally, the return date for mail ballots can be extended³⁷ to accommodate voters who may not be regularly residing at their residence or may be quarantining their mail.

Mail balloting provides no additional risk to Board agents, parties, voters, or the public and is consistent with current guidance of limiting in-person contact and travel. Even in the midst of this pandemic, the Region has already successfully conducted a number of mail ballot elections. Although an in-person count may be infeasible, arrangements can be made for a virtual remote count that provides all the safeguards of a traditional count.

³⁵ "Frequently Asked Questions, Spread" (updated October 21). CDC, above.

³⁶ "Running Essential Errands" (updated September 11). CDC <https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/essential-goods-services.html> (accessed October 29).

³⁷ In this case, I will extend the normal two-week period to return mail ballots to three weeks.

Manual election procedures inherently require substantial interaction among voters, observers, party representatives and the Board agent, all of whom must be present at the Employer's facility. The Board agent, observers, and party representatives participate in a pre-election conference in which they must inspect the voting area and check the voter list. The Board agent and observers must be present in the same space for the duration of the election period. In this regard, the Employer's proposal for a 10-hour polling period would greatly extend the period of time the Board agent and observers would spend together and with voters, increasing the risk of contracting COVID-19 should anyone be infected. A manual election would also require travel to the facility by a Board agent, and likely at least some party representatives, which by virtue of its significant distance from the Regional office, would require two overnight stays to accommodate the Employer's proposed polling session, bringing them into close contact with even more individuals (e.g., other travelers, hotel personnel and airport or gas station personnel) and increasing the risk of exposure to all election participants.³⁸ Given the availability of a mail ballot election, ordering a manual election under the current circumstances would be in direct contradiction to the federal, state and local guidance, all of which advise avoiding in-person contact, which a manual election necessitates. This guidance is even more critical now given the resurgence of COVID-19 throughout the country and in South Dakota specifically.

While the suggested protocols for manual elections in GC 20-10 appear to adopt many of the CDC's in-person election recommendations for when other alternatives are not available, the Board has a longstanding acknowledged and accepted alternative to in-person voting—its mail ballot procedure. Importantly, neither GC 20-10 nor the CDC's election guidelines have been updated to address the airborne transmission of COVID-19 and the expanded definition of "close contact." Furthermore, a mail ballot election avoids the uncertainties created by COVID-19. For example, it is now well established, although the exact percentage is uncertain, that certain individuals infected with COVID-19 remain asymptomatic and display no symptoms. It may take several days for a person who has been infected to start displaying symptoms, even though they are contagious prior to display of symptoms.³⁹ As a result, despite the proposed screening measures, infected individuals could participate in the election, unknowingly exposing coworkers, party representatives, observers, and the Board agent, who, along with the observers, will be in the voting area for a very long and sustained period of time while the CDC states the

³⁸ The length of the polling period is not dispositive of my decision to direct a mail ballot election, as a manual election of any duration would require substantial travel by a Board agent and likely at least some party representatives. Further, given the current COVID-19 situation, I would order a mail ballot election regardless of the length of the polling session, even if the proposed one was significantly shorter.

³⁹ "COVID-19 Pandemic Planning Scenarios" (updated September 10). CDC. <https://www.cdc.gov/coronavirus/2019-ncov/hcp/planning-scenarios.html> (identifying the "current best estimate" is that 50% of COVID-19 transmission occurs while people are pre-symptomatic and 40% of people with COVID-19 are asymptomatic and estimating the infectiousness of asymptomatic individuals compared to infectious individuals at 75%) (accessed October 29). See also "Evidence Supporting Transmission of Severe Acute Respiratory Syndrome Coronavirus 2 While Pre-symptomatic or Asymptomatic" (July). *Emerging Infectious Diseases Journal*. https://wwwnc.cdc.gov/eid/article/26/7/20-1595_article (accessed October 29); "The implications of silent transmission for the control of COVID-19 outbreaks" (July 28). *Proceedings of the National Academy of Sciences of the United States of America (PNAS)*. <https://www.pnas.org/content/early/2020/07/02/2008373117> ("silent disease transmission during the presymptomatic and asymptomatic stages are responsible for more than 50% of the overall attack rate in COVID-19 outbreaks") (accessed October 29).

virus “can remain suspended in the air over long distances (usually greater than 6 feet) and time (typically hours).”⁴⁰ A mail ballot election eliminates this risk.

Moreover, if an employee tests positive for COVID-19, suspects they may have COVID-19 due to symptoms, has an elevated temperature, or must be quarantined due to COVID-19 exposure, they will be deprived of their vote in a manual election, as there is no absentee ballot or remote voting options under the Board’s manual election rules.⁴¹ The potential for voter disenfranchisement increases when using all symptoms listed by the CDC and SD-DOH while the risk of transmission increases if using only the symptoms found in GC 20-10. Additionally, GC 20-10 does not provide an enforcement mechanism for any of its suggestions other than canceling the manual election, which would delay resolution of the question concerning representation. A mail ballot election avoids this significant pitfall and ensures all have an opportunity to vote regardless of their exposure to COVID-19 or health status. Ultimately, as GC 20-10 recognizes, the decision to conduct the election by mail ballot is within my discretion. In this case, as I have already described, we have not reached a safe enough juncture in the pandemic. I have determined that the most appropriate course of action at this time is to follow accepted guidance to limit in-person contact and interstate travel. Furthermore, there is no known date at which the guidance and circumstances I have described above will change. As a result, a mail ballot election in this matter will allow for holding of the election “at the earliest date practicable” consistent with Section 102.67(b) of the Board’s Rules and Regulations.

For the above reasons, I find that the appropriate and most responsible measure to ensure a safe election is a mail ballot election. A mail ballot election will eliminate the risk of unnecessarily exposing employees, Board agents, party representatives, and their families to COVID-19, and it will ensure that the Unit employees have the opportunity to vote promptly.

ELECTION DETAILS

I have determined that the election will be conducted through mail ballot. The mail ballots will be mailed to employees employed in the appropriate collective-bargaining unit from the office of the National Labor Relations Board, Region 18, on November 13, 2020, at 4:30 p.m.⁴² Voters must return their mail ballots so that they will be received in the National Labor Relations Board, Region 18 office by close of business at 4:30 p.m. on December 4, 2020. The mail ballots will be counted at the Region 18 office located 212 3rd Avenue South, Suite 200 in Minneapolis, Minnesota at 3:00 p.m. on December 7, 2020.

To help avoid the untimely return of a ballot, any person who has not received a ballot by November 20, 2020, or otherwise requires a duplicate mail ballot kit, should contact the Region 18 office in order to arrange for another mail ballot kit to be sent to that employee.

⁴⁰ “Scientific Brief: SARS-CoV-2 and Potential Airborne Transmission” (updated October 5). CDC. <https://www.cdc.gov/coronavirus/2019-ncov/more/scientific-brief-sars-cov-2.html> (accessed October 29). See also “How COVID-19 Spreads,” above.

⁴¹ NLRB Casehandling Manual (Part Two) Representation Proceedings, Sec. 11302.4. See also, *KRCA-TV*, 271 NLRB 1288, 1289 (1984).

⁴² The Union has not waived any of the ten-day period with the eligibility list.

To ensure the safety of the Board agent and the public, the count may be conducted virtually. Additional instructions will follow.

VOTING ELIGIBILITY

Eligible to vote are those in the unit who were employed during the weekly payroll period ending October 24, 2020, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off.

Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

VOTER LIST

As required by Section 102.67(l) of the Board's Rules and Regulations, the Employer must provide the Regional Director and parties named in this decision a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cellphone numbers) of all eligible voters.

To be timely filed and served, the list must be *received* by the Regional Director and the parties by **November 3, 2020**. The list must be accompanied by a certificate of service showing service on all parties. **The Region will no longer serve the voter list.**

Unless the Employer certifies that it does not possess the capacity to produce the list in the required form, the list must be provided in a table in a Microsoft Word file (.doc or .docx) or a file that is compatible with Microsoft Word (.doc or .docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. Because the list will be used during the election, the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015.

When feasible, the list shall be filed electronically with the Region and served electronically on the other parties named in this decision. The list may be electronically filed with the Region by using the E-filing system on the Agency's website at www.nlr.gov. Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions.

Failure to comply with the above requirements will be grounds for setting aside the election whenever proper and timely objections are filed. However, the Employer may not object to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure.

No party shall use the voter list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

POSTING OF NOTICES OF ELECTION

Pursuant to Section 102.67(k) of the Board's Rules, the Employer must post copies of the Notice of Election accompanying this Decision in conspicuous places, including all places where notices to employees in the unit found appropriate are customarily posted. The Notice must be posted so all pages of the Notice are simultaneously visible. In addition, if the Employer customarily communicates electronically with some or all of the employees in the unit found appropriate, the Employer must also distribute the Notice of Election electronically to those employees. The Employer must post copies of the Notice at least 3 full working days prior to 12:01 a.m. of the day of the election and copies must remain posted until the end of the election. For purposes of posting, working day means an entire 24-hour period excluding Saturdays, Sundays, and holidays. However, a party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution.

Failure to follow the posting requirements set forth above will be grounds for setting aside the election if proper and timely objections are filed.

RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 10 business days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this decision after the election on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

Pursuant to Section 102.5(c) of the Board's Rules and Regulations, a request for review must be filed by electronically submitting (E-Filing) it through the Agency's web site (www.nlr.gov), unless the party filing the request for review does not have access to the means for filing electronically or filing electronically would impose an undue burden. To E-File the request for review, go to www.nlr.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Although neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board, all ballots will be impounded where a request for review of a pre-election decision and direction of election

is filed within 10 business days after issuance of the decision, if the Board has not already ruled on the request and therefore the issue under review remains unresolved. Nonetheless, parties retain the right to file a request for review at any subsequent time until 10 business days following final disposition of the proceeding, but without automatic impoundment of ballots.

Dated October 30, 2020.

/s/ Jennifer A. Hadsall

Jennifer A. Hadsall, Regional Director
National Labor Relations Board, Region 18
Federal Office Building
212 Third Avenue South, Suite 200
Minneapolis, Minnesota 55401-2657

Attachment